IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL REVISION NO.1357 OF 2002

DATE OF DECISION: FEBRUARY 14, 2007

Dhana Singh and others

.....Petitioners

VERSUS

State of Punjab

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. **Whether Reporters of local papers may be allowed to see the judgement?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

PRESENT: Mr. D. D. Sharma, Advocate,
for the petitioners.

Mr. M. C. Berry, Sr.DAG, Punjab,
for the State.

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RANJIT SINGH, J.

The petitioners, through the present revision petition, seeks quashing of the order dated 15.6.2002 passed by Additional Sessions Judge, Barnala, vide which he has directed their re-trial from the stage where the applications under Section 311 Cr.P.C. moved by the prosecution was declined.

The petitioners, convicted for offences under Sections 467, 468, 471, 120-B IPC by the Additional Chief Judicial Magistrate, Barnala, on 4.5.2001 and sentenced to various terms of rigorous imprisonment, had filed an appeal against the same before the Additional Sessions Judge, Barnala. Two of the co-accused of the petitioners, namely, Ram Singh and Bhola Singh,

however, were acquitted by the trial Court. On 15.6.2002, the Additional Sessions Judge, Barnala, while setting-aside the conviction and sentence passed by the trial Court, sent the case back for re-trial from the stage when two applications under Section 311 Cr.P.C. moved by the prosecution were dismissed. The Additional Sessions Judge also directed the trial Court to proceed in accordance with the directions contained in its judgment and then to decide the case afresh after taking into consideration the evidence already led and to be led during re-trial. The re-trial was to be completed within a period of four months and the parties were to appear before the trial Court on 17.7.2002. The order directing re-trial is under challenge in the present revision petition.

The revision was admitted on 20.8.2002 and further proceedings were ordered to be stayed. Though the case was directed to be listed for hearing within a period of six months but the same has remained pending before this Court till present date.

The facts, leading to the prosecution of the petitioners, noticed in brief, are that Dhan Raj @ Basant Muni, a saintly person in nature and Chela of one Arjan Dass, was residing at Dera Baba Bhagwan Dass at Village Dhurkot and was Mohatmim of the said Dera. He also owned some property in Village Bhaini Bagha in his own name. Hardam Singh, Dhanna Singh, Ram Singh and Bhola Singh, having land adjoining to the land of said Dera, allegedly prepared forged wills of Dhan Raj @ Basant Muni which are dated 8.7.1986 and 29.10.1986 in order to grab the land of the Dera so also his personal property. On coming to know of these forged wills, Dhan Raj had got these wills cancelled on 27.10.1986 and

13.7.1987. It is then alleged that Dhanna Singh, Hardam Singh, Ram Singh and Bhola Singh produced some imposter in the Court in place of Dhan Raj @ Basant Muni and obtained a forged decree dated 18.7.1991 in their favour by playing this fraud. Allegation further is that they then conspired with each other and had taken Dhan Raj to Uttar Pradesh with an intention to kill him and in this manner, Ram Singh and Hardum Singh committed murder of Dhan Raj and threw his body into river. FIR bearing No.166 dated 5.12.1994 for offences under Sections 364, 302, 468, 471 read with Section 34 IPC was registered at Police Station Tapa. On 1.4.1992, Hardum Singh alongwith his brother had visited Tehsil Barnala and in connivance with others forged a power of attorney shown to have been executed by Dhan Raj in his favour. Dhanna Singh was allegedly produced as an imposter in place of Dhan Raj for the purposes of executing said power of attorney, whereas Dhan Raj had already been murdered in July 1991 and accordingly the power of attorney so obtained was clearly a forged and fabricated document. After getting the same registered, the land of Dhan Raj was sold on the basis of said forged power of attorney on 25.11.1992 to Avtar Singh, Ajaib Singh and Makhan Singh. On the basis of this allegation, the present FIR was registered. After trial, petitioners Dhanna Singh, Hardum Singh,Gurcharan Singh and Piara Singh were found guilty of forging an attorney for the purpose of cheating and Hardum Singh was further found to have used the same for selling the land in favour of Avtar Singh etc. The Court found that the prosecution had miserably failed to bring home the guilt of accused Ram Singh and Bhola Singh and accordingly they were acquitted of

the charges levelled against them.

The conviction and sentence was taken in appeal before Additional Sessions Judge, Barnala. It was urged before the appellate Court that the alleged thumb impression of Dhan Raj on the power of attorney were not got compared with the specimen thumb impression of Dhanna Singh, who was allegedly produced as an imposter in place of Dhan Raj. It was contended that to prove the case of prosecution to the hilt, it was required to lead best available evidence and it was to get the thumb impression appearing on the power of attorney compared with the standard thumb impression of Dhanna Singh. The grievance was also made that the said power of attorney was not produced as such and in its absence, the offence of forgery can not be said to be proved against the present petitioners. It was further urged that the date of death of Dhan Raj was also not sufficiently established by the prosecution. To justify the conduct of Dhan Singh in refusing to give thumb impression, it was also stated that no adverse inference could be drawn against the petitioners-accused on this count as he being accused could not be compelled to be a witness against himself. It is noticed that public Prosecutor, appearing in support of the prosecution case, could not seriously dispute that the best evidence to prove the forgery of the power of attorney was the comparison of thumb impression of Dhan Raj with his standard thumb impression and also the comparison thereof with the thumb impression of Dhanna Singh, who was allegedly produced as imposter. He, however, pointed out that an application under Section 311 Cr.P.C. was moved by the prosecution in this regard for leading such evidence and that the said application,

was unjustly dismissed on 28.9.2000. Prosecution accordingly pleaded that it was deprived of opportunity to lead best evidence. It is submitted that the duty was equally on the Court to suo-motu direct the production of best available evidence having regard to the provisions of Section 311 Cr.P.C., even if the prosecution had failed to do so. Swayed by the submissions, the Appellate Court came to conclude that it was the duty of the Court to find out the truth in order to render a just decision, as is required by the provisions of Section 311 of the Code of Criminal Procedure though the appellants stood convicted for the offence charged. It was further noticed that the Court could exercise its discretionary power under Section 311 Cr.P.C. at any stage of enquiry, trial or other proceedings and could summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person in attendance though not summoned as a witness. Referring to second part of Section 311 Cr.P.C., the Appellate Court found that it left no discretionary option with the Court to act in the manner as legislated, if fresh evidence is needed for just decision in a case. Referring to two applications moved by the prosecution, which were for recalling of Dr.Atual K.Singla, Document Expert, for further examination and for summoning the original record of the registered power of attorney dated 1.4.1992 from the office of Sub Registrar, Barnala, the Appellate Court found fault with the order rejecting the said applications being not warranted in view of the fact that the accused-petitioners had refused to give their specimen thumb impressions/signatures during the course of investigation. The Appellate Court accordingly found that

the said applications were wrongly rejected. The Court further observed that by acting on the basis of inchoate and incomplete evidence, the trial Court conducted the trial in an irregular or defective manner. Finding that the trial Court had failed to ensure production of best available evidence by rejecting the applications under Section 311 Cr.P.C., the Appellate Court found it to be a fit case for ordering re-trial. This direction, ordering re-trial of the petitioners is made a cause of serious grievance by the petitioners in the present revision. While ordering re-trial, the trial Court was directed to continue the same from the stage where the applications under Sections 311 Cr.P.C. were dismissed by it. Further directions are given in Para 13 of the judgment in the manner in which the re-trial is to be held.

It would, as such, require consideration if the re-trial in the present case has rightly been directed or not? Powers of Court while hearing appeals are regulated by the provisions of Section 386 Cr.P.C. Apart from other enabling powers, the Appellate Court, in an appeal from a conviction, is entitled to reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or commit for trial. Power to order re-trial is available with the Appellate Court not only when it is hearing an appeal against conviction but while hearing such appeal from the order of acquittal or for enhancement of sentence. This power, though available under Section 386 Cr.P.C., is held to be discretionary in nature. Though the provision of re-trial is available and legislated in the form of Section 386 Cr.P.C., but it would be an enabling provision and retrial is not to

be ordered merely on the asking. As held by the Hon'ble Supreme Court in ***Ukha Kolhe Vs. The State of Maharashtra,*** AIR 1963 Supreme Court 1531, an order of re-trial in a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interest of justice, the appellate Court deems it appropriate, having regard to the circumstances of the case that the accused should be put on his trial again. It was further observed by the Hon'ble Supreme Court that an order of re-trial wipes out from the record the earlier proceedings and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. The Hon'ble Supreme Court noticed that it would not be a sufficient ground for ordering re-trial if it is found that the evidence led at the trial is deficient in important respects. In this background, it was viewed that if the Appellate Court think that the additional evidence is necessary in the interest of justice and for a just and proper decision of the case, it should, instead of directing a re-trial, exercise its power under Section 428 (1) of the old Code of

Criminal Procedure (Section 391 of the New Code). It is, thus, noticed that re-trial is not to be ordered merely to enable the prosecution to produce additional evidence for filling up lacuna and even if it is found that some essential evidence is missing, then resort to Section 391 Cr.P.C. (428 of the old Code) can be made by the Appellate Court in this regard.

This Court in ***Chander Bhan Vs. Devi Dass and another,*** 1975 Cri.L.J. 1003 held that power of High Court to order re-trial whether in appeal from conviction or from acquittal is a discretionary one. It was further held that no hard and fast rule can be laid down regarding the power of the High Court to order re-trial or to take additional evidence as it depends on the facts and circumstances of each case whether any one of the two courses should be adopted. The Court further observed that if the trial by a Magistrate is incurably defective so that even the taking of additional evidence would not put the Appellate Court in a position to dispose of the case satisfactorily, then re-trial should be ordered. Re-trial cannot be ordered where it can result in mis-carriage of justice. In this regard reference can be made to ***Jitendera Nath Bose Vs. The State,*** 1991 Cri.L.J. 922. Re-trial was ordered in those cases where the evidence was wrongly rejected. In ***Chhotka Vs. The State,*** AIR 1958 Calcutta 482, it is held by the Court that no doubt a new trial is one of the forms of interference in an appeal as also in a reference under Section 374 of the Code of Criminal Procedure, but retrial is indicated only when the accused is deprived in substance of a fair trial. Where the Court finds it difficult to take upon itself the responsibility of deciding on the guilt or innocence of the accused, a

retrial should be granted. But when there is abundant evidence which requires to be considered and upon which the question of the accused's guilt or innocence can safely be decided , a retrial is not to be ordered. On the same aspect, in ***Ramanlal Rathi Vs. The State,*** A.I.R. 1951 Calcutta 305, it is observed that a retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case or because the case is a serious one. Therefore, as noticed in Ukha Kolhe's case (supra), re-trial cannot be ordered merely to enable the prosecution to lead evidence, which was not earlier properly led. Taking these aspects into consideration, it is to be seen as to whether re-trial has rightly been ordered in the present case?

Mr.D.D.Sharma, counsel appearing for the petitioners, would first submit that the manner in which the re-trial is ordered it would result in even re-trial of those persons who were acquitted by the trial Court. He points out that no appeal was filed by the State against the order of acquittal of Ram Singh and Bhola Singh and hence, their re-trial can not be held or take place.

Concededly there was no appeal pending before the Appellate Court against the acquittal of Ram Singh and Bhola Singh. Accordingly, no direction for re-trial of both these persons, who stood acquitted by the trial Court, could resultantly be issued.The impugned

order does not clarify in any manner if re-trial is only against the petitioners or against the co-accused who were already acquitted. Since this aspect is not mentioned specifically in the impugned order, it would obviously mean that Ram Singh and Bhola Singh, accused, are also put to re-trial alongwith the present petitioners. This would be totally impermissible course in law. The precedent, if any, needed in this regard, can be had in the form of ***State of West Bengal Vs. Laisal Haque and another etc.,*** AIR 1989 Supreme Court 129. It is held in this case that where out of several accused some are acquitted and convicted accused preferred an appeal against their conviction and no appeal is preferred by the State, the Court could neither alter acquittal nor there be splitting up of the trial. Re-trial directed by the High Court in this case was accordingly held not sustainable as it would amount to re-trial de-novo against all the accused. In this case out of 42 accused, the Sessions Judge had acquitted 25 and the accused convicted by the Sessions Judge had preferred an appeal against their conviction but no appeal was preferred by the State against the persons acquitted. The Hon'ble Supreme Court, while setting-aside the order of re-trial passed by the High Court, observed as under:-

> “10.....It failed to appreciate that in an appeal by the respondents under S.374 (2) of the Code, the order of acquittal passed by the learned Additional Sessions Judge as against the 26 other accused could not be interfered with. The High Court also failed to appreciate that there cannot be a piecemeal trial. The retrial directed by the High Court must necessarily revise the prosecution

and must result in a trial de novo against the 42 accused. The 26 other accused acquitted by the learned Additional Sessions Judge were not impleaded as parties to the appeals before the High Court. In the absence of an appeal preferred by the State Government against their acquittal, the High Court could not under S.386 (b) on an appeal by the respondents against their conviction alter the acquittal nor can there be a splitting up of the trial."

The situation before me is exactly identical to the one dealt by the Hon'ble Supreme Court in the case of Laisal Haque (supra). Here also, there was no appeal against the two persons acquitted by the trial Court but still, the appellate Court ordered re-trial from the stage where the applications moved by the prosecution under Section 311 Cr.P.C. were rejected. Obviously, it would lead to re-trial of the accused persons who were acquitted by the trial Court. This is clearly im-permissible. No appeal was preferred by the State against their acquittal. In ***State of Karnataka Vs. Narsa Reddy,*** AIR 1987 SC 2104, also the splitting up of the trial was held to be not permissible. The impugned order, as such, is not sustainable on this short ground. In this regard only a reference can also be made to ***Jadayandi and another***, AIR 1963 Madras 83. As noticed in Chander Bhan's case (supra), re-trial could be ordered only where the trial is incurably defective so that even the taking of additional evidence under Section 391 Cr.P.C. will not put the Appellate Court to dispose of the case satisfactorily. In other words, it would mean that where the additional evidence could be taken by the Court, ordering of re-trial may not be necessary. Reference may now be

made to the provisions of Section 391 Cr.P.C., which empowers the Appellate Court to take further evidence or directed to be so taken. Section 391 Cr.P.C. reads as under:-

> "***Appellate Court may take further evidence or direct it to be taken:-***
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> (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.
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> (2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.
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> (3) The accused or his pleader shall have the right to be present when the additional evidence is taken.
>
> (4) The taking of evidence under this Section shall be subject to the provisions of Chapter XXIII, as if were an inquiry."

The Appellate Court is justified in observing that the applications moved by the prosecution for leading additional evidence under Section 311 Cr.P.C. were not properly dealt with and were wrongly rejected. The powers available to the Court under the provisions of Section 311 Cr.P.C. are wide enough and it has been consistently held that the Court is under a duty to summon and examine or recall or re-examine any such person if his evidence

appears to be essential for the just decision of the case. Accordingly, the second part of the Section almost contains a mandate for the Court to act in the manner as laid down. There may be some discretion with the Court in the first part of the Section but second part of the section makes it mandatory for the Court to so act and to summon and examine such witness or witnesses if it finds that the same is essential to the just decision of the case. Therefore, the evidence, which the prosecution had wished to lead for recalling/calling of a witness to prove certain facts, appears very essential for the just decision of the case and accordingly order, rejecting the applications of the prosecution cannot be justified. However, re-trial on this ground may not sound appropriate in view of the legal position especially so when there was no appeal against the order of acquittal against some of the co-accused. The only proper course, as such, was to utilise the provisions of Section 391 Cr.P.C. , as has been so ruled by the Hon'ble Supreme Court in the decisions noticed above. It may need a notice here that the trial Court had found the petitioners guilty on the basis of available evidence. Though not so specifically held, the appellate Court perhaps did not consider the available evidence sufficient to uphold conviction and so considered it essential to have additional evidence on record. In this background, it was more appropriate for the appellate Court to record this additional evidence under Section 391 Cr.P.C. rather than ordering re-trial by up-setting the conviction.

In view of the detailed discussion, the impugned order dated 15.6.2002 passed by the learned Additional Sessions Judge, Barnala, is set-aside. As a consequence thereof, the Appellate Court

is directed to deal with the appeal afresh. The Appellate Court would also be at liberty to utilise the provisions of Section 391 Cr.P.C. for taking the additional evidence on record and any other additional evidence if considered essential for just decision of the case. Needless to mention that the Appellate Court would be at liberty to act suo-motu to examine or re-examine the witnesses, if it considers essential for the just decision of the case, and would not reopen the acquittal of Ram Singh and Bhola Singh which has acquired finality.

The petition would stand disposed of accordingly.

February 14, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**